The Indiana Prosecutor

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FENTANYL, THE NEW DRUG OF ABUSE?

In the last week articles appeared in two major newspapers attributing a recent rise in deaths to the drug Fentanyl. Both the Chicago Tribune and the Detroit Free Press reported an outbreak of deaths caused by this prescription pain killer.

Fentanyl is a synthetic form of Morphine; however, it is 80 times more potent than Morphine. First used in the 1960's as an intravenous surgical anesthetic, it is now prescribed for use in fighting severe reoccurring pain predominately seen in cancer patients. It is also used in veterinary clinics to immobilize large animals.

Now as a generic, Fentanyl can be found on the market under a variety of trade names and forms. Duragiesic@ is an over-the-skin patch similar to a nicotine patch and is used in chronic pain management. An oral form is also available. Actiq@, referred to on the street as " Perc-O-Pops" looks similar to a foam covered oral swab.

The drug can be induced intravenously, smoked, absorbed through the skin or ingested orally. Within the previous two months, a woman in the Indianapolis area overdosed by chewing on a skin patch. After a night of partying, she tried to get the last of the medication, which unfortunately killed her.

Access to the drug can be obtained by prescription or, of course, illegal means. Theft of Fentanyl has been reported from pharmacies, nursing homes, and veterinary clinics as well as out of home medicine cabinets. The drug is also manufactured by clandestine labs which are believed to be located in Mexico.

The effects of Fentanyl mimic those of Heroin with the exception that they may be hundreds of times stronger. Symptoms of overdose include: difficulty breathing, extreme sleepiness, difficulty thinking, talking or walking, small pinpoint pupils, faintness, dizziness, confusion and coma.

Detroit and Chicago are experiencing problems with drug dealers lacing heroin with Fentanyl. Authorities believe this supped up form of the drug is intended to attract heavy users who require a stronger dose of heroin to obtain a high. However, both cities are seeing a large number of overdose deaths due to the practice. While Chicago reported 42 deaths attributable to Fentanyl overdose in a year, Detroit saw 23 in the period between May 18th through May 24th, 2006.

Due to the large number of deaths, Detroit has asked and received assistance from the Centers for Disease Control and Prevention. Investigators from the center traveled to Michigan last week to assist detectives in Detroit. Samples of Fentanyl laced heroin from Chicago drug busts are being tested to determine if the Fentanyl is pharmaceutical grade or whether it is from a clandestine lab. Investigators are unsure whether the Fentanyl laced Heroin is from one particular distributor or from multiple dealers.

If the drug is being trafficked from Mexico to Chicago and Detroit, how long before we see it in Indiana as well? ❖

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"Perc-O-Pop"

Recent Decisions

U.S. Supreme Court

- Police can enter a home without a warrant to protect occupants from serious injury.

Brigham City v. Stuart, 2006 U.S. Lexis 4155, 05/22/06.

http://www.supremecourtus.gov/opinions/05pdf/05-502.pdf

The U.S. Supreme Court reached a quick decision in Brigham City v. Stuart. On May 22, 2006 the justices rendered a unanimous decision that will be helpful to law enforcement officers.

On July 23, 2000, Brigham City Police Officers responded to a call that neighbors were having a loud party. When they reached the address, officers heard shouting from inside the house. They walked down the driveway to investigate the noise and found two juveniles drinking beer in the backyard. From the yard, officers observed a fight in progress inside the house. Through the screen door and window, officers saw four adults trying to restrain a juvenile. The juvenile broke free and punched an adult in the face causing him to spit blood into the sink. Three other adults then pushed the juvenile against a refrigerator, moving the appliance. At this point, officers moved to the doorway and yelled "police", announcing their presence. As the scuffle continued, officers entered the kitchen and again announced their presence. Order was then restored and the adults were arrested for contributing to the delinquency of a minor, disorderly conduct and intoxication.

Defendant, in a motion to suppress, argued that the officers entrance into the home without a warrant was a violation of his Fourth Amendment rights. He first argued that the officers entered the home to make an arrest and not to interrupt a potentially violent situation. Defense's second argument addressed the seriousness of the situation. He contended the situation was not so violent as to justify entering the home without a warrant. Brigham City argued the officers were responding to exigent circumstances which allowed for a warrantless entry. The trial court granted defendant's motion and the Utah Court of Appeals affirmed the trial court.

Utah's Supreme Court also found in favor of the defendant. They based their decision on two principles. First, they found that the injury received by the adult was so insignificant that it did not trigger the "emergency aid" doctrine. Second they found that since the officers arrested the adults instead of giving medical aid, the exception did not apply.

The U.S. Supreme Court granted certiorari to clarify the appropriate standard used to determine when circumstances rise to the level of exigency allowing a warrantless entry by law enforcement officers. In some jurisdictions the justification for entry is linked to the mind set of the officer. Did the officer intend to enter the home to provide aid or to seize evidence?

Chief Justice Roberts, in writing for the Court, found that the officer's state of mind did not matter. Whether they entered the kitchen to assist a citizen or to effectuate an arrest was irrelevant. The test was whether the officer's actions, viewed objectively, justified the warrantless entry.

In reviewing the gravity of the situation claim, the Court found that too was irrelevant in determining the appropriateness of the entry. Chief Justice Robert's wrote "Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided." The officers were confronted with a continuing violent situation, and they had an objective belief that an injured adult in the home may need assistance. Going into the house without a warrant was reasonable under the circumstances.

The officer's manner of entrance into the house was also reasonable. With a battle going on, it was reasonable for the officers to announce their presence by yelling. Knocking on the door would not have garnered any more attention than verbally announcing their presence. The Court found that there was no violation of the knock-and-announce rule.

Utah Supreme Court's decision to suppress the evidence was reversed. ❖

Indiana Court Decisions

Indiana Supreme Court

- **Statements which appear incriminating may not establish credibility of a declarant.**

State v. Spillers, ___ N.E.2d ___ (Ind. 2006).
http://www.in.gov/judiciary/opinions/pdf/05230601rdr.pdf

On May 23, 2006, the Indiana Supreme Court published *State v. Spillers*. The Court granted transfer to clarify what constitutes a "declaration against interest" statement which can be used to establish the credibility of an informant sufficiently that it may be relied upon in determining probable cause for issuance of a search warrant. While the Court unanimously voted to affirm the conviction, there was a 3-2 disagreement on what factors were required to determine whether a statement was against interest.

Anderson police officers served a search warrant at the home of Aaron Craib. More than 3 grams of cocaine was discovered and Craib was arrested. Craib then told detectives that he had received the cocaine from Heath Spillers. He admitted to obtaining cocaine from Spillers on multiple occasions including the day of his arrest. Craib furnished detectives with Spillers address, and the make and model of his car.

Detective Jake Brooks sought a search warrant based on Craib's information. During a probable cause hearing, Detective Brooks testified that he had received the information that day from Craib and that Craib said he had received cocaine from Spillers on ten different occasions. The detective also notified the court that Craib had not been used previously as an informant. A search warrant was issued and served on Spillers. Detectives recovered 13-14 grams of cocaine as well as scales. Spillers was arrested and charged with dealing in cocaine.

Spillers filed a motion to suppress which was granted by the trial court. The State filed a belated motion for interlocutory appeal which was granted by the trial court. However, the appellate court would not accept jurisdiction. The State then dismissed the charges and then appealed. The Court of Appeals reversed the order granting the motion to suppress and transfer was sought.

The Supreme Court focus was on when and under what circumstances hearsay statements may support probable cause for the issuance of a search warrant. Spillers argued that the facts in this case were insufficient to demonstrate probable cause for a warrant because there was no evidence to establish Craib's credibility or corroborate his statements. The State argued that Craib's statements were corroborated and his credibility was established because his statements amounted to a declaration against interest.

Hearsay may be used in determining probable cause if the trustworthiness of the statements can be established. There are several ways to establish the reliability of information including whether the informer has given truthful information in the past, whether independent police investigation corroborates the information given, where some basis is shown for the informant's knowledge or where the informant is able to predict activity of the suspect which is not easily predicted. A statement that is against penal interest or could subject the maker to criminal sanctions, can also be used to determine the trustworthiness of the information.

Here the Court found that the police did confirm Craib's information concerning Spiller's address and car. However, they did not corroborate that Spiller supplied Craib with drugs. The Court found that absent some other basis for finding Craib was a credible source of information a magistrate could not rely on his statements for a probable cause determination.

Next the Court reviewed the State's contention that Craib's credibility was established by implicating himself in criminal activity, a statement against penal interest. The Court reviewed several Federal and Indiana Court decisions which examined when a statement is against penal interest. They found that in most cases where the statements were determined to be against penal interest, the informant had either volunteered the information after being arrested for a minor offense, or the informant was not under arrest but voluntarily gave the police inculpatory information which the police would not have otherwise known. The Court then contrasted these fact situations with the one in Spillers. They found that Craib was caught "red-handed" and therefore had nothing to loose in giving information to the police. This made his tip less credible. The Court concluded that Craib's statements were not against his penal interest. Therefore, he was not a credible source of information.

The Court then examined the warrant from a good faith basis. They found that the detective did not mislead the magistrate when he sought the warrant. They also reasoned that since it took them a good deal of in depth analysis to determine that Craib's statement was not against penal interest, a law enforcement officer would not have known that the judge shouldn't have granted the warrant. Therefore the detective relied in good faith when he executed the warrant. Based on the good faith exception the evidence should not have been suppressed. ❖

Indiana Supreme Court

- Smells emanating from an active Meth lab presented sufficient exigent circumstances to enter a home without a warrant.

Holder v. State, ___ N.E.2d ____ (Ind. 2006).
http://www.in.gov/judiciary/opinions/pdf/05180601bd.pdf

Booneville Police Officer Jonathan Bruner was patrolling the city when he smelled ether. He drove through neighborhoods trying to locate the source of the smell. Two other officers confirmed the smell as ether and joined the search. After fifteen minutes they determined the aroma was emanating from a particular property. Walking up the driveway the officers found a truck which appeared to be under repair. Not finding any containers containing ether around the vehicle, the officers suspicions were concentrated on the house.

Still smelling the strong odor of ether, the officers noticed a cracked basement window. Officer Bruner approached the house and sniffed outside the window where he noticed a very strong smell of ether coming from the crack. Officers then knocked on the front door which was not answered. They then knocked on the back door. The defendant looked thorough the window, opened the door, stepped outside, and then quickly shut the door. During the brief period that the door was open, officers were hit with the pungent smell of ether. When asked about the odor, the defendant denied smelling anything. He was asked to consent to a search of his house, which he denied. But Holder offered that he had been charged with manufacturing methamphetamine in an adjacent county.

"We hold that an objectively reasonable belief in the immediate need to protect the public from death or serious injury supported the officer's conclusion that exigent circumstances justified the immediate warrantless entry into the defendant's house, notwithstanding the unreasonable search and seizure provision of the Fourth Amendment."

While officers were waiting on a warrant, Holder volunteered that his three year old grandchild was inside and she required his assistance. When asked whether there was anyone else inside the house, he stated that there were two other adults inside. Concerned that the child was in danger and the two adults could destroy evidence, the officers entered the home without a warrant. Inside they found a meth lab.

Holder was charged with four counts related to the manufacture and possession of methamphetamine. He filed a motion to suppress based on a violation of both the Fourth Amendment of the US Constitution and Article I, Section 11 of the Indiana Constitution. Holder asserts two arguments to support his contention that his rights were violated. First, Holder contends that the police should not have entered his property and sniffed at his window without a warrant. Second, there were no exigent circumstances that justified entering the home without a warrant when he refused consent to enter the house. The Trial Court denied the motion to suppress, but the Court of Appeals reversed. Transfer was granted by the Indiana Supreme Court.

The Indiana Supreme Court reviewed the arguments under both Fourth Amendment and Article I analysis. They found that regardless the examination, the officers acted appropriately in entering the house without a warrant.

In addressing Holder's first claim, the Court noted persons have no expectation of privacy in objects, activities or statements that are exposed to plain view. Here the smell of ether emanated at least 100 yards outside of the house. Since the house was located in a residential community, the neighbors were at risk, and the police had to track down the smell. Walking onto the property to find the source was not unreasonable nor was sniffing at the window. Both were designed to discover the source of the smell. The exigent nature of the circumstances justified the intrusion on Holder's property and the sniff outside his window.

The Court found likewise that the intrusion into Holder's home was also justified by the exigent circumstances. Specifically they noted that the police were motivated by a desire to protect the three year old child from danger and to prevent evidence from being destroyed. While they noted that there was no indication that evidence was being destroyed inside the home, no sounds of a "rush of activity" consistent with that theory, the immediate danger to the child justified entering the home.

Justice Dickson wrote "Several Courts have concluded that a belief that an occupied residence contains a methamphetamine laboratory, which belief is found on probable cause based largely on observation of odors emanating from the home, presents exigent circumstances permitting a warrantless search for the occupants' safety..... We agree."

"We hold that an objectively reasonable belief in the immediate need to protect the public from death or serious injury supported the officer' conclusion that exigent circumstances justified the immediate warrantless entry into the defendant's house, notwithstanding the unreasonable search and seizure provision of the Fourth Amendment."

(continued on page 5)

Analysis under the Indiana Constitution provided the same result. The odor of ether emanating from the house provided a great deal of concern. Law enforcement needed to protect the neighbors and occupants from a potentially explosive situation. The extent of law enforcement's needs coupled with the degree of concern, suspicion and knowledge that a violation had occurred far outweighed the degree of intrusion into Holder's activities. Defendant's motion to suppress was properly denied by the trial court. ❖

Indiana Court of Appeals

- ***Datzek v. State*, 838 N.E.2d 1149 (Ind. Ct. App. 12/14/2005)**

http://www.in.gov/judiciary/opinions/pdf/12140502jts.pdf

On October 1, 2003, Greenfield Police Officer Noble was on duty when he observed the defendant Datzek enter a Citgo gas station and pay for some items. The officer noticed that Datzek had poor balance and was unsteady in his steps. Officer Noble left the store and watched Datzek drive away. Datzek turned from the gas station onto the highway without using a turn signal. At that time, Officer Noble executed a traffic stop of Datzek.

Officer Noble approached Datzek and noticed an odor of alcoholic beverage coming from his person. Datzek failed three field sobriety tests. Officer Noble read Indiana's implied consent law to Datzek and Datzek agreed to take a chemical test. Officer Noble then took Datzek to Hancock Memorial Hospital for a blood draw. The hospital was three minutes away. The hospital report indicated that Datzek had a whole blood alcohol content of 0.11 (after converting a serum blood alcohol content of 0.13). After a bench trial, Datzek was found guilty of Operating with a BAC of at least .08 with a Prior Conviction, a Class D Felony.

- ***Traffic stop justified***

Datzek first contends that the traffic stop was illegal because there is no statutory requirement to use a turn signal when entering the highway from a parking lot. The Court rejected this argument and held that Indiana Code § 9-21-8-25 requires that a vehicle must use a turn signal whenever it intends to turn or change lanes. "There are no restrictions that it only applies in certain situations or on certain roadways." Turning onto a highway from a parking lot is still a violation of IC § 9-21-8-25. The Court found that the traffic stop was justified.

- ***Officer not required to perform least intrusive chemical test***

Datzek next argued that the trial court abused its discretion when admitting his blood draw results, because the blood draw was not the least intrusive means of chemical testing. Datzek cites *Terry*, which states that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Datzek argues that a blood draw should only be given if there is a reason that a breath test is not available. The Court rejected this argument.

Indiana Code 9-30-6-2(d) states that "a person must submit to each chemical test offered by a law enforcement officer in order to comply with the implied consent provisions of this chapter." Indiana's implied consent law does not provide that police officers must use the least intrusive chemical test.

The court further held that the requirement that an officer use the least intrusive means of investigation during a Terry stop is necessary because the officer is making the stop without probable cause. In order to offer a chemical test under the implied consent law the officer must already have probable cause to believe that the person is intoxicated. Therefore, the requirement that an officer use the least intrusive means does not apply to his decision as to which chemical test to offer.

- ***Pirtle advisement not necessary for chemical test***

Datzek argued that the trial court also abused its discretion by admitting his blood alcohol test results because he was not given a *Pirtle* advisement before being asked to consent to the chemical test of his blood. In *Pirtle*, the Indiana Supreme Court held that "a person who is asked to give a consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent."

The Court rejected Datzek's argument, reasoning that "we have previously held that the purpose of the *Pirtle* doctrine would not be served by extending that doctrine to apply to field sobriety tests or chemical breath tests." Furthermore, a person who drives on Indiana's roads has no right to consult with an attorney prior to deciding whether or not to submit to a chemical test under the implied consent law.

The Indiana Court of Appeals affirmed Datzek's conviction. Rehearing was denied on February 13, 2006 and transfer was denied on April 27, 2006. ❖